IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAVERNE M. HAY, DAVID COPLING and DUSTIN QUEENAN,	)	Civil Action No. 2001-CV-1030
v.	)	
GMAC MORTGAGE CORPORATION	)	

* * *

APPEARANCES:
MARC H. PACHTMAN, ESQUIRE
On behalf of Plaintiffs

MICHAEL L. BANKS, ESQUIRE
SARAH E. BOUCHARD, ESQUIRE
PAUL C. EVANS, ESQUIRE
On behalf of Defendant

* * *

O P I N I O N

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on Defendant's Motion for Summary Judgment of Claims of Plaintiff's David Copling and Dustin Queenan filed June 19, 2002, which motion is unopposed.[1] For the reasons set forth below, we grant defendant's motion for

[1] This matter was originally assigned to our former colleague District Judge Jay C. Waldman. By Order dated September 9, 2002, Judge Waldman granted plaintiffs a final extension of time until October 18, 2002 to respond to defendant's motion for summary judgment. As of the date of this Memorandum and accompanying Order, plaintiffs have not filed a response to defendant's motion for summary judgment. Accordingly, we consider defendant's motion for summary judgment in conjunction with Federal Rule of Civil Procedure 56 which permits the grant of summary judgment only where there are no genuine issues for trial and judgment as a matter of law is appropriate.

summary judgment regarding plaintiffs David Copling and Dustin Queenan and dismiss Counts III, IV and V of the Amended and Restated Complaint filed June 11, 2001.[2]

Complaint

In their amended Complaint, plaintiffs Dustin Queenan and David Copling assert claims for racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and 1991[3], and the Pennsylvania Human Relations Act ("PHRA")[4], against defendant GMAC Mortgage Corporation ("GMAC").[5] (Counts III, IV and V). Plaintiffs also each also assert a claim for retaliation because they complained about racial discrimination.

Facts

Based upon the pleadings, record papers, discovery depositions, affidavits, defendant's motion and brief and the exhibits submitted by defendant as uncontroverted or otherwise taken in the light most favorable to the plaintiff, the pertinent

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[2] By separate Order and Opinion filed in conjunction with the within Order and Opinion, we dismissed the claims of plaintiff Laverne M. Hay.

[3] 42 U.S.C. §§ 2000(e) to 2000(e)-17; 42 U.S.C. § 1981

[4] Act of October 27, 1955, P.L. 744, No. 222, §§ 1-13, as amended, 43 P.S. §§ 951-963.

[5] The Complaint contains five counts. Plaintiff Laverne Hay ("Hay") brings two charges against defendant (Counts I and II), plaintiff David Copling ("Copling")brings one count against defendant (Count III), and plaintiff Dustin Queenan ("Queenan") brings two counts against defendant (Counts IV and V).

facts are as follows.

Plaintiff Queenan began working for GMAC as a Consumer Loan Servicing Specialist on November 17, 1997. In Spring 1999 Queenan was promoted to the position of Supervisor in the Call Center.

Plaintiff Copling began working for GMAC as a Customer Loan Servicing Specialist on December 9, 1996. Defendant promoted him to Team Leader in February 1997, to Supervisor in September 1997, and to Assistant Manager in the Call Center in March 1999.

In late 1999 GMAC decided to reorganize its Client Branded Solutions Group ("CBSG") which included the Call Center in which both plaintiffs worked. As part of the reorganization, defendant filled several leadership positions and created a new management position. Diane Bowser became the Managing Director of Customer Operations with direct responsibility for the Call Center.

When plaintiff Queenan first met Miss Bowser at a meeting of all the managers and supervisors in the Call Center, she told them that if she ever received any complaints about their customer interaction, she was going to “pull us kicking and screaming out of our chairs."[6] Plaintiff Queenan was offended by these remarks and told his immediate managers about Miss Bowser's

[6] Deposition of plaintiff Dustin Queenan, March 28, 2002, page 61.

harsh approach. Additionally, plaintiff Queenan believed that Miss Bowsher was unnecessarily harsh on several occasions when he interacted with her. However, he testified that she never made any race-based comments.

Miss Bowser implemented and monitored further changes within the Call Center to make defendant's customer service more efficient. Defendant transferred its research division from the Call Center to another department to allow the Call Center to focus on customer communications.

In February 2000 defendant changed the management structure of the Call Center. Prior to the reorganization, two Assistant Managers, including plaintiff Copling, and five Supervisors, including plaintiff Queenan, ran the daily operations of the Call Center. However, defendant decided to create a single manager devoted exclusively to running the Call Center. In March 2000 defendant hired Joanne Maricle to fill that position.

After creating the manager position in the department, GMAC decided to eliminate one assistant manager and one supervisor position.[7] Instead of just demoting or firing one supervisor and one assistant manager, defendant decided to give the assistant manager and the supervisors three options: (1)

[7] At that time, one assistant manager was African American, plaintiff Copling, and another Hispanic. Of the supervisors, three were African American, one was Caucasian, and one was Asian.

reapply to keep their supervisory position in a competition open to everyone at the company; (2) accept positions as non-supervisory customer care specialists with no reduction in pay; or (3) accept a voluntary lay-off and receive a severance package.

Miss Bowser presented these options to the affected employees in late March 2000. Defendant conducted another meeting in April, led by both Miss Bowser and Miss Maricle, to explain the options. As a result of concerns expressed by the affected employees at the meeting, defendant eliminated some of the "accountabilities" requirements.

On April 20, 2000, shortly after the meeting, plaintiffs Queenan and Copling, along with three other affected employees, wrote a memorandum to GMAC stating that they voluntarily decided not to reapply for their former supervisory positions. Instead all five accepted positions as Customer Care Specialists. The remaining two supervisors affected by the reorganization chose to reapply for their positions and defendant selected them. Because defendant only filled two of the five available supervisor slots, it looked outside the organization for the three remaining positions. Two of those hired were African American.

In April 2000 Miss Maricle received a grievance from a customer named Mr. Hirsch who was displeased with how plaintiff

Queenan had treated him over the phone when requesting that a prepayment penalty on his mortgage be waived. The customer told Miss Maricle that when he asked to speak with Queenan's supervisor, plaintiff responded that he did not have a supervisor.[8]

The customer also told Miss Maricle that he became angry with Mr. Queenan and swore at him. The customer reported that plaintiff Queenan responded by saying "yo mama" and hung up the phone. Mr. Queenan denies that he uttered that phrase to the customer, but acknowledged that he disconnected the call after the customer became hostile.

On April 13, 2000 Miss Maricle conducted a meeting with plaintiff Queenan to discuss the customer complaint. Miss Maricle provided plaintiff Queenan with the customer's version of events. In so doing, she changed the tone of her voice to mimic that of an "uneducated black man" when she repeated the words "yo mama" to him.[9] After the meeting, Miss Maricle prepared a written warning for plaintiff Queenan based on the customer's allegations. However, plaintiff protested and Miss Maricle decided not to place the reprimand in

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[8] Mr. Queenan acknowledges that he told the customer that he did not have a supervisor but rather had an Assistant Manager. He testified that he wanted to ensure that the customer had the correct title for the individual who oversaw his work.

[9] Plaintiff Queenan contends that when he returned to the office after being terminated to discuss his receipt of unemployment benefits, Ms. Maricle once again made a reference to the "yo mama" remark and stated that he might be more comfortable if she addressed him that way.

his personnel file.

On April 25, 2000 plaintiff Queenan approached GMAC's Voice of the Associate ("VOA") department because he believed Miss Maricle had targeted him.[10] He told VOA that he did not believe the reorganization of the Call Center was fair and was dissatisfied by the proffered explanation for the reorganization. He also stated that the reorganization was discriminatory.

Mr. Queenan also asserted that although he did not receive a written warning from Miss Maricle for the customer complaint, he still believed that she discriminated against him in addressing it. He specifically referred to Miss Maricle's derogatory imitation of an African-American accent. Additionally, he stated that he considered his workplace to be hostile and referred to the lack of diversity in defendant's upper management.

Also around this period, defendant learned that one of the Supervisors in the Call Center who was unhappy with the reorganization planned to forward her letter of resignation over the Company's electronic mail ("e-mail") system late on a Friday night. Given the timing and manner of notification, defendant would be unable to find supervisory coverage for the Call Center on Saturday afternoon.

Defendant learned that plaintiffs assisted this

[10] VOA is an internal forum where defendant's employees can lodge formal grievances with their employer or co-workers.

employee with her resignation letter and her plan to submit it in the most disruptive manner possible. Mr. Copling denies any involvement in the scheme but was aware that people were engaging in such action. As a result of these actions, defendant began reviewing the e-mail accounts of all of the individuals believed to be complicit in the scheme, including plaintiffs.[11]

When reviewing plaintiffs' e-mail accounts, defendant learned that plaintiff Queenan had been providing pagers and monthly service to friends and co-workers while on company time. He used defendant's e-mail system to bill co-workers and subordinates who purchased his services. In April 2000 plaintiff Queenan had used defendant's e-mail system 15 times to bill his customers. He testified that he usually billed customers by providing them with a paper invoice, but that no paper was available in April and that he used e-mail instead.

Pursuant to defendant's Technology Policy, defendant's computers and networks are to be used exclusively for "Company business purposes". The policy provides that "[v]iolation of [these] policies will constitute grounds for immediate dismissal, for cause, at the discretion of the Company." Defendant had sent out two notices in April reminding employees of this policy. Defendant sent these notices before it learned of plaintiff

[11] Defendant's Technology Policy, set forth in the Employee Handbook distributed to all employees, stipulates that the Company reserves the right to access employee e-mails.

Copling’s violations.

The first memo, issued to CBSG employees on April 4, 2000, warned that "inappropriate technology use will not be tolerated" and that defendant “take[s] these issues very seriously and any associate engaging in such activity will be subject to disciplinary action, up to and including termination." On April 26, 2002 defendant sent a second memo to all of its employees expressing similar sentiments.

Defendant also has an Outside Employment Policy which prohibits employees from conducting other business on company time.

On May 3, 2000 defendant terminated plaintiff Queenan for violating both its Technology Policy for prohibited use of defendant's e-mail system and for conducting his pager business during defendant's business hours.

Meanwhile, during defendant's review of plaintiff Copling's e-mail system, it found that on April 26, 2000 he had forwarded a downloaded message containing offensive language to a subordinate employee. Plaintiff Copling advised defendant that he had received the offensive e-mail, but could not state that he “definitely” forwarded the message onto another employee. As a result of this violation of the defendant’s Technology Policy, plaintiff Copling was given a written warning on May 8, 2002, which reminded Mr. Copling that it was inappropriate to forward

personal e-mails and that he must stop such behavior.

Standard of Review

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 433 (3d Cir. 2003). Only facts that may affect the outcome of a case are “material”. Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252

(3d Cir. 1999); Woods v. Bentsen, 889 F. Supp. 179, 184 (E.D. Pa. 1995).

Discussion

Race Discrimination Claims

The same general standards and analyses are applicable to plaintiffs' Title VII and PHRA claims. See Jones v. School District Of Philadelphia, 198 F.3d 403, 410-411 (3d Cir. 1999); Gomez v. Allegheny Health Services, Inc., 71 F.3d 1079, 1083-1084 (3d Cir. 1995).

A plaintiff has the initial burden of establishing a prima facie case of employment discrimination by showing he was a member of a protected class, he was qualified for the job he held, he suffered an adverse employment action, and the surrounding circumstances give rise to an inference of discrimination. See Pivirotto v. Innovative Systems, Inc., 191 F.3d 344, 353-354 (3d Cir. 1999); Fuentes v. Perksie, 32 F.3d 759, 763 (3d Cir. 1994).

Once a plaintiff establishes a prima facie case of employment discrimination, the burden then shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action against the plaintiff. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-507, 113 S.Ct. 2742, 2747, 125 L.Ed.2d. 407, 416 (1993); McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 35 L.Ed.2d 668

(1973); Goosby v. Johnson & Johnson Medical Inc., 228 F.3d 313, 319 (3d Cir. 2000). If the defendant articulates such a reason, the plaintiff could still prevail by demonstrating that the employer's proffered reasons were not its true reasons, but rather a pretext for unlawful discrimination. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 143, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105, 117 (2000); Goosby, 228 F.3d at 319.

The plaintiff must present evidence from which a factfinder could reasonably disbelieve the employer's proffered reasons, from which it may then be inferred that the real reason for the adverse action was discriminatory, or otherwise present evidence from which one could reasonably find that unlawful discrimination was more likely than not a determinative cause of the employer's action. Hicks, supra ; Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir. 1997).

To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating "such weakness, implausibilities, inconsistencies, incoherencies, or contradictions" for the proffered explanation that one could reasonably conclude it is incredible and unworthy of credence, and ultimately infer that the employer did not act for the asserted non-discriminatory reasons. Fuentes, 32 F.3d at 765. The ultimate burden of proving that a defendant engaged in

intentional discrimination remains at all times on the plaintiff. Hicks, supra.

As African-Americans, plaintiffs Queenan and Copling are both members of a protected class. They each contend that they were discriminated against on the basis of their race. There is no dispute that they were both qualified to perform their jobs in the Call Center.

However, defendants contend that with the exception of plaintiff's Queenan's termination, neither plaintiff can make out a prima facie case of employment discrimination or retaliation because plaintiff's cannot demonstrate that defendant took any adverse employment action against them.

Only conduct which "alters the employee's 'compensation, terms, conditions, or privileges of employment,' deprives him or her of 'employment opportunities,' or 'adversely affects his or her status as an employee'" is proscribed by Title VII. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1300 (3d Cir. 1997). Defendants concede that plaintiff Queenan's termination constitutes an adverse employment action, but contend that none of the other actions plaintiffs cite could be characterized as adverse.

Presumably both plaintiffs will cite as adverse employment actions by defendant, the reorganization in the department which led to plaintiffs' loss of their supervisory

titles. However, defendant did not demote the plaintiffs, but rather reorganized its Call Center operations in a manner requiring that plaintiffs and all other similarly employed supervisors, regardless of race, reapply for their old managerial positions. Plaintiffs voluntarily chose not to reapply, in protest of the reorganization. Given the unchallenged evidence that plaintiffs chose not to reapply for the positions, the reapplication process conducted by defendant does not constitute an adverse employment action.

In Larou v. Ridlon, 98 F.3d 659, 664 (1st Cir. 1996) the United States Court of Appeals for the First Circuit held that posting a new job position encompassing many of the same responsibilities as plaintiff former position, was not an adverse employment action because the plaintiff could have applied for the new position. Moreover, in Lottinger v. Shell Oil Company, 143 F. Supp. 2d 743, 758 (S.D. Tex. 2001) the court held that a change in job title and responsibility necessitated by a business reorganization without an accompanying change in salary or benefits does not constitute an adverse employment action under the Americans with Disabilities Act. Accordingly, because plaintiffs chose not to reapply for the positions, we conclude that the reapplication process conducted by defendant does not constitute an adverse employment action.

Plaintiff Copling may also cite as an adverse

employment action, the written warning he received after defendant learned that plaintiff had violated its Technology Policy. In order to constitute an adverse employment action, a reprimand must effect a material change in the terms or conditions of plaintiff's employment when accompanied by no other changes in employment. A mere presumed effect is insufficient. See Weston v. Pennsylvania, 251 F.3d 420, 430-431 (3d Cir. 2001).

In Weston the United States Court of Appeals for the Third Circuit held that two written reprimands which remained in plaintiff's file for a six-month period did not effect a material change in the terms or conditions of plaintiff's employment. In the within case, although the written warning will presumably remain in plaintiff Copling's personnel file indefinitely, he fails to identify any material change in his employment after defendant reprimanded him. Accordingly, we conclude that the written warning cannot constitute an adverse employment action.

Plaintiff Queenan cites the written warning he received regarding the April 2000 customer complaint as an adverse employment action. However, because defendant did not place the reprimand in plaintiff's personnel file, it does not constitute an adverse employment action. See Hopkins v. Baltimore Gas & Electric Company, 77 F.3d 745, 754 (4th Cir. 1996); Coney v. Department of Human Resources, 787 F. Supp. 1434, 1442 (M.D. Ga. 1992).

In addition to the foregoing, we conclude that plaintiffs have failed to adduce any evidence to support an inference of discrimination. However, even if plaintiffs can make out a prima facie case of discrimination, defendant has articulated legitimate, nondiscriminatory reasons for what plaintiffs deem to be defendant's adverse employment decisions. To satisfy its burden in this regard, defendant only needs to introduce evidence that would "permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." Fuentes, 32 F.3d at 763.

In this case, plaintiffs contend that defendant's decision to reorganize the Call Center management structure was discriminatory. Although defendant's decision may have been disruptive to plaintiffs' employment, the decision was part of defendant's larger effort to reorganize the CBSG to increase efficiency. The reorganization leading to the creation of a Manager of the Call Center position and elimination of several of the supervisory positions held by plaintiffs, was a legitimate, nondiscriminatory reason requiring plaintiffs to reapply for their supervisory positions. See Jones v. WDAS FM/AM Radio Stations, 74 F. Supp. 2d 455, 465 (E.D. Pa. 1999).

Next, plaintiffs contend that defendant's decisions to issue a written warning to plaintiff Copling and terminate plaintiff Queenan were discriminatory actions. Defendant argues

that the disciplinary actions resulted from plaintiffs' undisputed violations of its Technology Policy. Plaintiff Copling used company e-mail to forward a downloaded message containing inappropriate material. Meanwhile, plaintiff Queenan violated two of defendant's rules by using company e-mail to conduct an outside business selling pager services.

Moreover, plaintiffs' e-mail accounts were only reviewed by defendant as a result of its investigation into the role the plaintiffs played in encouraging a co-worker to resign her position in a manner that proved most disruptive to defendant's business. Accordingly, we conclude that defendant has met its burden of providing a legitimate, nondiscriminatory reasons for its actions.

Once the defendant has provided a legitimate, nondiscriminatory reason for the adverse actions, plaintiff must then have an "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Josey v. John R. Hollingsworth Corporation, 996 F.2d 632, 638 (3d Cir. 1993), citing Texas Department of Community Affairs v. Burdin, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

To discredit a legitimate reason proffered by the employer, a plaintiff must present evidence demonstrating "such

weakness, implausibilities, inconsistencies, incoherencies, or contradictions" for the proffered explanation that one could reasonably conclude it is incredible and unworthy of credence, and ultimately infer that the employer did not act for the asserted non-discriminatory reasons. Fuentes, 32 F.3d at 765. The ultimate burden of proving that a defendant engaged in intentional discrimination remains at all times on the plaintiff. Hicks, supra.

In this case, plaintiffs offer no evidence to rebut defendant's legitimate, nondiscriminatory reasons for the actions allegedly taken against them. Regarding the reorganization of the Call Center which required that plaintiffs apply to retain their supervisory positions, plaintiffs fail to point to any evidence showing that this decision was a pretext for discrimination.[12]

As to defendant's written warning to plaintiff Copling, he does not deny downloading and forwarding the inappropriate e-mail which prompted the warning. Nor does Mr. Copling deny that his actions were a violation of defendant's Computer Policy. As to defendant's termination of plaintiff Queenan, he also does not deny using defendant's e-mail system to conduct personal business

[12] Plaintiffs merely suggest that they do not believe that the reason given for the reorganization, enhancing defendant's efficiency, accounts for the changes. Plaintiffs fail to produce any tangible evidence to support their speculation. Because the reorganization adversely affected a racially diverse group of employees, mere speculation is insufficient.

while on the defendant's time in violation of defendant's policy.

Moreover, neither plaintiff identifies any individuals similarly situated who were treated differently by defendant.[13] Accordingly, we conclude that plaintiffs have failed to present sufficient evidence to permit a factfinder to reasonably infer that defendant's legitimate reasons were pretextual.

Retaliation Claims

Plaintiffs also allege that defendant retaliated against them for complaining of discrimination. Title VII prohibits an employer from discriminating against an employee because he opposed any unlawful employment practice. 42 U.S.C. 2000e-3(a); Durham Life Insurance Company v. Evans, 166 F.3d 139, 157 (3d Cir. 1999).

To establish a prima facie case for retaliation, a plaintiff must demonstrate that (1) he engaged in activity protected by Title VII; (2) he suffered an adverse employment action after, or contemporaneous with, the protected activity; and (3) a causal link existed between the protected activity and the adverse action. See Weston, 251 F.3d at 430; Krouse v. American Sterilizer Company, 126 F.3d 494, 500 (3d Cir. 1997).

The burden then shifts to the defendant to offer a legitimate non-retaliatory reason for the adverse action.

[13] Defendant states that since 1999, it has terminated 61 individuals for various violations of its Computer Policy.

Woodson v. Scott Paper Company, 109 F.3d 913, 920 (3d Cir. 1997). Informal protests of discrimination, such as complaints to management, rise to the level of protected activity. Abramson v. William Patterson College, 260 F.3d 265, 288 (3d Cir. 1997). However, only grievances actionable under Title VII are considered a protected activity. See Walden v. Georgia Pacific Corporation, 126 F.3d 506, 513, n.4 (3d Cir. 1997).

Plaintiffs Copling and Queenan engaged in a protected activity when they expressed their concerns to defendant's Voice of the Associate program on April 25, 2000, that the reorganization of the Call Center may have been discriminatory.

Defendant argues that plaintiff Copling's retaliation claim must fail because he failed to exhaust his claim with the federal Equal Employment Opportunity Commission ("EEOC") or the Pennsylvania Human Relations Commission ("PHRC"). Before the plaintiff in a Title VII suit can bring a claim in court, the claim must first be exhausted before the EEOC or a comparable state agency. 42 U.S.C. § 2000e-5(f)(1); Antol v. Perry, 82 F.3d 1291 (3d Cir. 1996). Similarly, a claim brought pursuant to the PHRA must also be exhausted administratively before it can be brought in court. See Burgh v. Borough Council of the Borough of Montrose, 251 F.3d 465, 471 (3d Cir. 2001); Woodson, 109 F.3d at 925.

When a plaintiff fails to specifically allege

retaliation as part of his administrative claim, a court must determine whether the acts alleged in the complaint are within the scope of the complaint or the investigation arising from it. Waiters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984). In making this determination, the court must consider whether there is a "close nexus between the facts supporting each claim or whether additional charges made in the judicial complaint may fairly be considered explanations of the original charge or growing out of it." Fakete v. Aetna, Inc., 152 F. Supp. 2d 722, 732 (E.D. Pa. 2001); see also Glavis v. HGO Services, 49 F. Supp. 2d 445, 448-449 (E.D. Pa. 1999).

In plaintiff Copling's filing with the PHRC regarding discrimination, he neither alleges nor provides any indication that defendant retaliated against him.[14] Although the EEOC would have been on notice to investigate defendant's discrimination claim against plaintiff, the EEOC would not have been expected to initiate a retaliation investigation based on plaintiff's claim. See Douris v. Schweiker, 229 F. Supp. 2d 391, 398 (E.D. Pa. 2002); Ivory v. Radio One, Inc., 2002 WL 501489, at *2 (E.D. Pa. April 5, 2002); Grosset v. Waste Management, Inc., 2001 WL 25649, *2 (E.D. Pa. Jan. 5, 2001); Turgeon v. Marriott Hotel Service, Inc., 2000 WL 1887532, at *9

[14] In his EEOC filing, plaintiff only stated that defendant had discriminated against him. Plaintiff did not check the box on the EEOC form indicating that he felt that GMAC had retaliated against him.

(E.D. Pa. Dec. 20, 2000). Accordingly, plaintiff Copling's Title VII and PHRA retaliation claim must be dismissed.[15]

Meanwhile, plaintiff Queenan administratively exhausted his retaliation claim by alleging in his EEOC complaint that defendant retaliated by terminating plaintiff for complaining of discrimination. However, plaintiff Queenan cannot make out a prima facie case for retaliation because he has not shown a causal link between the protected activity and the allegedly retaliatory act, his termination. Although defendant terminated plaintiff Queenan after he complained about discrimination, temporal proximity alone is insufficient to show a causal connection. Rather, the plaintiff must show that the motives of the employer were retaliatory. See Kachmar v. Sunguard Data Systems, Inc., 109 F.3d 173, 178 (3d. Cir. 1997).

In this case, plaintiff Queenan has failed to adduce any evidence that would permit a reasonable juror to conclude that plaintiff's termination was motivated by his complaint of discrimination. Defendant terminated plaintiff Queenan less than two weeks after it discovered that he had violated the company's Technology Policy and the company prohibition against doing

[15] Moreover, even if plaintiff Copling's retaliation claim had been administratively exhausted, his retaliation claim would not have been legally cognizable. Plaintiff Copling would be unable to establish a prima facie case for retaliation because defendant never took any adverse employment action against him after he complained of discrimination. The only retaliatory act alleged by plaintiff Copling is the written warning he received for violating defendant's Technology Policy. However, it had no effect on the terms and conditions of his employment and, therefore, cannot provide the basis for an adverse employment action. See Weston, 251 F.3d at 430-431.

outside work on company time. Moreover, as noted above, defendant only reviewed plaintiff Queenan's e-mail because it suspected that he was involved in a plan to encourage an employee to resign in a disruptive manner.[16]

For all the foregoing reasons, we conclude that neither plaintiff established that defendant retaliated against him.

Hostile Work Environment

Plaintiffs assert that defendant created a hostile work environment in violation of Title VII and the PHRA. A hostile work environment exists when a workplace is permeated with discriminatory intimidation, ridicule, and insult so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). Incidents of harassment are pervasive if they occur in concert of with regularity. Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990).

To state a hostile work environment claim premised on racial animus, an employee must establish that: (1) he suffered intentional discrimination because of his race; (2) the discrimination was "pervasive and regular"; (3) he was adversely affected by the discrimination; (4) the discrimination would

[16] Further, even if plaintiff Queenan established a prima facie case of retaliation, he has failed to present evidence to rebut defendant's legitimate, non-discriminatory reason for terminating him.

adversely affect a reasonable person of the same race; and (5) respondeat superior liability applies. Cardenas v. Massey, 269 F.3d 251, 260 (3d Cir. 2001); Weston, 251 F.3d at 426; Kunin v. Sears, Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999). Although overt racial harassment is not necessary, the plaintiff must be able to show that race is a substantial factor in the harassment. Aman v. Cort Furniture Rental Corporation, 85 F.3d 1074, 1083 (3d Cir. 1996); Andrews, 895 F.2d at 1482.

Plaintiffs have failed to adduce evidence showing that they were subjected to a hostile work environment. A reasonable factfinder could not conclude from the competent evidence that plaintiffs were subjected to intentional racial discrimination, let alone on a regular and pervasive basis. See Aman, 85 F.3d at 1081. Even assuming the acts complained of were racially motivated, they clearly did not create an abusive working environment. Weston, 215 F.3d at 426.

Defendant's actions in reorganizing the Call Center in a manner that affected employees of several races, threatening to terminate any employee who was the source of customer complaints, and the one occasion where a supervisor allegedly imitated an African-American when describing how a customer stated that plaintiff Copling behaved, and were not remotely threatening, humiliating or disruptive to plaintiffs' work performance. These actions would not detrimentally affect any reasonable person in

the same position.

Accordingly, the incidents cited by plaintiffs are insufficient to rise to the level of being severe and pervasive. Moreover, the plaintiffs failed to demonstrate that any of the conduct which they characterize as hostile occurred because of their race. In sum, we conclude that plaintiffs failed to establish a hostile work environment claim.

Conclusion

If there is evidence to support plaintiffs' claims, they have not produced it. Subjective perceptions, contrived or strained interpretations, suppositions and speculation do not constitute competent evidence.

One cannot reasonably conclude from the record presented to the court that defendant discriminated against either plaintiff on the basis of race. One cannot reasonably conclude from the record that the acts which purportedly constitute a hostile work environment were abusive, would detrimentally affect a reasonable person similarly situated, or resulted from intentional racial discrimination. Also, one cannot reasonably find that either plaintiff was a victim of retaliation.

Accordingly, for all the foregoing reasons, defendant is entitled to summary judgment as a matter of law against both plaintiffs. Therefore, we grant defendant's motion for summary

judgment and dismiss the claims of plaintiffs David Copling and Dustin Queenan contained in Counts III, IV and V of their Amended and Restated Complaint.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LAVERNE M. HAY,	)	
DAVID COPLING and	)	Civil Action
DUSTIN QUEENAN,	)	No. 2001-CV-1030
	)	
v.	)	
	)	
GMAC MORTGAGE CORPORATION	)	

O R D E R

NOW, this 11th day of September, 2003, upon consideration of Defendant's Motion for Summary Judgment of Claims of Plaintiff's David Copling and Dustin Queenan filed June 19, 2002, which motion is unopposed; upon consideration of defendant's brief in support of its motion; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED that defendant's motion for summary judgment is granted.

IT IS FURTHER ORDERED that Counts III, IV and V of the Amended and Restated Complaint filed June 11, 2001 on behalf of plaintiffs David Copling and Dustin Queenan are dismissed.

IT IS FURTHER ORDERED that judgment is entered in favor of defendant GMAC Mortgage Corporation and against plaintiffs David Copling and Dustin Queenan.

BY THE COURT:

_____
James Knoll Gardner
United States District Judge